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Supreme Court, U.S.
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No. 03-1418

IN THE

Supreme Court of the United States

ROBERT HARRIS, *et al.*,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION and JANE F. GARVEY, Administrator of the Federal Aviation Administration, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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I. SINCE RESPONDENTS DO NOT DENY THE EXISTENCE OF A CONFLICT AMONG THE CIRCUIT COURTS ON THE QUESTIONS PRESENTED, AS WELL AS ERROR BY THE LOWER COURT, THE PETITION SHOULD BE GRANTED AND THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE SUMMARILY REVERSED.

Respondents' brief in opposition to the petition for certiorari is a remarkable document. The government's opposition makes no effort to defend the decision of the D.C. Circuit on the questions presented by the petition. Nor do Respondents dispute Petitioners' demonstrations that this decision conflicts with decisions of other U.S. Circuit Courts of Appeals, or that the D.C. Circuit's holding was erroneous as a matter of law. Instead, Respondents' sole argument is that, even if this petition for a writ of certiorari is granted and the judgment below is reversed, the government might eventually prevail on grounds that were never addressed by the courts below.

The government's opposition demonstrates the need for this Court to grant certiorari. The clear implication of the government's failure to defend the Court of Appeals' decision is that even the government recognizes the error of the Court of Appeals' determination on the critical issue of ripeness in this matter. Moreover, the opposition does not even cite or address the cases from other circuits, identified in the petition for certiorari, that show that there is a conflict among the circuit courts of appeals with regard to determining ripeness of claims seeking review of agency action. Again, the clear implication is that even the government recognizes that there

is a conflict in the circuits on this important issue. This Court should grant certiorari to resolve the conflict.

Instead of addressing the questions presented by the petition, which originate from the issues actually addressed by the lower courts, the government inappropriately asks this Court to deny the petition based solely on its prediction that it will ultimately win the case on a different ground. The government suggests that the petitioners' claims are barred by the preclusive effects of the Civil Service Reform Act (CSRA). As the government acknowledges, *see* Opposition at 10, the courts below never ruled on this argument. Accordingly, the government can only claim that it believes it will win the case on this alternative ground even if this Court reverses and remands. Many respondents have such hopes, but under such circumstances, it is commonplace for this Court to decide only the issues actually presented by a petition, and then, if necessary, remand the case for further proceedings on other issues.[1]

Needless to say, petitioners strongly disagree with the government's CSRA argument. The short answer to this argument is that, during the time petitioners were rehired by the Federal Aviation Administration (which occurred

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1. Just this past Term, for example, in *Fellers v. United States*, 124 S. Ct. 1019 (2004), this Court faced an analogous situation. It granted certiorari and determined that government agents' deliberate elicitation of statements from the petitioner had violated his rights under the Sixth Amendment, notwithstanding the possibility that, even if that were true, the government could win anyway, because the only statements actually admitted during petitioner's trial were subsequent statements made after a knowing and voluntary waiver of petitioner's right to counsel. This Court directed the court of appeals to consider that argument on remand. *Id.* at 1023.

between 1995 and 1998, *see* Petition at 4a), the agency had been statutorily exempted from the CSRA's coverage and its attendant personnel guidelines. The government acknowledges this fact. *See* Opposition at 8 n.3. It is particularly clear in petitioners' view that CSRA exclusivity cannot apply to agencies that are wholly outside the CSRA system. The government's assertion that some aspects of the CSRA once again covered the FAA at the time of petitioners' lawsuit, Opposition at 8, is unavailing and irrelevant. The relevant time is the time when petitioners were rehired by the agency, as this is when their hardship arose and rights to seek relief accrued, during which time they were statutorily exempt from the CSRA.

The real point, however, is not that the government's CSRA argument is incorrect (although it is), but that it is not this Court's practice to decide such issues in the first instance. *See, e.g., Lee v. Kemna*, 534 U.S. 362, 388 (2002) ("We ordinarily do not decide in the first instance issues not decided below.") (internal quotation omitted). For the reasons stated in the petition for certiorari, this Court should grant the petition to decide the questions actually presented by the petition which were addressed by the lower courts. Indeed, given the government's failure to defend the court of appeals' decision on those questions, it would be appropriate for this Court to grant the petition and reverse the court of appeals' judgment summarily, without requiring

further briefing or argument. In any event, the question of CSRA exclusivity should be left to the lower courts' consideration on remand.

CONCLUSION

The petition for certiorari should be granted, the judgment summarily reversed, and the case remanded for further proceedings. In the alternative, the petition for certiorari should be granted.

Respectfully submitted,

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